Petition

No. 81-432

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Petitioners,

—v.—

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the use of civil service eligible lists in 1973-74 for appointment of candidates to the position of New York City police officer in rank order in accordance with their examination scores, as mandated by New York Civil Service Law, constitutes a claim of continuing discriminatory refusal to hire in violation of Title VII of the Civil Rights Act of 1964, as amended, where the underlying examinations were administered in 1968-70 and the eligible lists fixing the order of appointments were promulgated no later than 1971, prior to the effective date of Title VII as against municipalities?

2. Even if the use of the eligible lists constituted a discriminatory refusal to hire, did the Court of Appeals err in holding that the use of the eligible lists constituted a policy of discrimination such that, if any class member was refused hire within the applicable 300 day limitations period, that timely claim would resurrect the otherwise stale claims of class members hired prior to the limitations period?

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IN THE

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No. _____

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Petitioners, New York City Civil Service Commission and its individual members, Department of Personnel, Police Department and Police Commissioner, seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed in part and reversed in part an order of the United States District Court for the Southern District of New York and remanded for entry of a new decree.

In 1976, plaintiffs, black and Hispanic police officers in the New York City Police Department, commenced this action challenging the written portions of eight entry-level Police Officer examinations administered between 1968 and 1970 as being racially discriminatory in violation of 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The Court of Appeals held that the examinations were not job-related under Title VII and the use of the rank-ordered eligible lists promulgated therefrom after 1972 constituted a continuing pattern of discriminatory refusal to hire in violation of Title VII, which action was not time-barred.

OPINIONS BELOW

The opinion of the Court of Appeals, 633 F.2d 232 (2d Cir. 1980), is set forth in the Joint Appendix submitted herewith at page A 1. The order of the Court of Appeals dated June 1, 1981, denying plaintiffs' and defendants' petitions for rehearing (not officially reported) is set forth at page A 97. The opinion of the District Court, 466 F. Supp. 1273 (S.D.N.Y. 1979), is set forth at page A 108. The order of the District Court is set forth at page A 99.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1980. Plaintiffs' and defendants' timely petitions for rehearing were denied on June 1, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 1331.

STATEMENT OF THE CASE

(1)

Between 1968 and 1970, the New York City Department of Personnel administered eight civil service examinations for the position of New York City Police Officer: Examination Nos. 7065, 8046 and 8108 (1968); Nos. 9019, 9049, 9080 and 9081 (1969); No. 0013 (1970). Each examination resulted in an eligible list for appointment on which candidates were rank-ordered in accordance with their test scores, adjusted by veterans' preference as required by New York Civil Service Law §§ 50, 56 and 61. Except for List No. 0013, promulgated March 5, 1971, each of the eligible lists was established prior to May 1, 1970 (Exh. F).[1] The promulgation of an eligible list pursuant to New York Civil Service Law finally fixes the order of appointment of candidates.

A hiring freeze was imposed on the New York City Police Department from May, 1970 to January, 1973. While some appointments were made from List Nos. 7065, 8046 and 8108 prior to the freeze, the bulk of the appointments from the lists were made beginning January 29, 1973.[2] As a result of the

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1 Unless otherwise indicated, all references preceded by "JA" refer to pages in the Joint Appendix submitted herewith. References preceded by "A" refer to pages in the Joint Appendix submitted to the Court of Appeals. All other references are to the original papers.

2 Pursuant to New York Civil Service Law § 56, an eligible list has a life of from one to four years. The eight police officer lists were

three-year hiring freeze, appointments from the lists were made as quickly as possible until the lists were exhausted. Each of the candidates on the lists was called for appointment by the end of 1973. Appointments continued through October 7, 1974, however, because some candidates either could not accept appointment on the earlier date, did not initially meet the eligibility requirements, or there were difficulties in completing their background investigations. In October, 1974, a hiring freeze was again imposed on the Police Department.

Of the police officers hired in 1973-74, 23% were black and Hispanic. The census data indicated that black and Hispanics comprised only 18.7% of the work force between 20 and 29 years of age with 12 years of schooling (Exhs. QQ and I, pp. 5, 2). The age and schooling qualifications are requirements for the position of police officer in New York City.

On June 30, 1975, the Police Department was required to layoff approximately 2,800 police officers for budgetary reasons (JA 141-42).[3] The layoffs were made in accordance with section 80 of the New York Civil Service Law in the inverse order of appointment. All officers laid off in 1975 have since been offered reemployment with the Police Department.

(2)

In March, 1972, black and Hispanic candidates for the position of New York City Police Officer commenced an action alleging that the written portions of the eight police officer examinations administered between 1968 and 1970 discriminated against blacks and Hispanics in violation of 42 U.S.C. §§ 1981 and 1983. *Guardians Association of the New York City Police Department, et al.* v. *Civil Service Commission of*

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extended beyond the four-year period by a court order in *Kirton* v. *Bronstein*, N.Y.L.J., 11/13/72, p. 17 (Sup. Ct., N.Y. Co.).

3 On June 30, 1975, more than 5,000 officers were noticed for layoffs, but the layoff of approximately 2,500 officers was rescinded by July 4, 1975.

the City of New York, et al., 72 Civ. 1278 (S.D.N.Y.) (hereafter "*Guardians I*"). The plaintiffs in *Guardians I* alleged that the examinations were discriminatory, causing black and Hispanic candidates to fail or score lower than they otherwise would have. Their test scores caused them to hold lower positions on the eligible lists, thus delaying their appointments (JA 3).

In July, 1973, the District Court denied plaintiffs' application for a preliminary injunction suspending hiring from the challenged lists, and in November, 1973, the Court of Appeals affirmed the denial on the grounds that the eligible lists were nearly exhausted. *Guardians I*, 490 F.2d 400 (2d Cir. 1973). Plaintiffs then abandoned the action (JA 3).

(3)

In May, 1975, the named plaintiffs herein filed charges of discrimination with the Equal Employment Opportunity Commission (hereafter "EEOC") challenging the proposed layoffs of police officers as discriminatory against black and Hispanic police officers (JA 131). In March, 1976, the plaintiffs moved in *Guardians I* to compel discovery regarding the impact of the layoffs on black and Hispanic officers. Plaintiffs were advised by the District Court that the action was closed and did not appeal from that ruling (JA 3).

(4)

On May 2, 1976, plaintiffs commenced this action (hereafter "*Guardians II*") on behalf of all black and Hispanic police officers laid off on June 30, 1975. Like the plaintiffs in *Guardians I*, they alleged that, but for the discriminatory examinations in 1968-70, they would have been appointed earlier and would have accrued sufficient seniority to withstand the layoffs. Plaintiffs argued that the layoffs were discriminatory in violation of Title VII of the Civil Rights Act, as amended, as well as 42 U.S.C. §§ 1981 and 1983, in that they perpetuated the effects of the discriminatory examinations (A 4a).

On March 29, 1977, the District Court entered an order granting plaintiffs' application for a preliminary injunction, directing the reordering of the seniority lists to accord plaintiffs appropriate constructive seniority (A 417a-421a). The Court concluded, after an evidentiary hearing, that the examinations were discriminatory under Title VII standards and the layoffs perpetuated the effects of the prior discrimination in violation of Title VII. The Court further found that neither the examinations nor the layoffs were intentionally discriminatory and held that they did not violate 42 U.S.C. §§ 1981 and 1983. *Guardians II*, 431 F. Supp. 526 (S.D.N.Y. 1977) (JA 139-97).

Defendants appealed from the preliminary injunction order. On June 21, 1977, the Court of Appeals vacated the injunction and remanded to the District Court for reconsideration in light of this Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). *Guardians II*, 562 F.2d 38 (2d Cir. 1977) (JA 137-38).

(5)

On remand, plaintiffs amended their complaint to assert a claim under Title VI of the Civil Rights Act of 1964 and renewed their motion for a preliminary injunction (A 590sa). In view of this Court's decision in *Teamsters*, *supra*, holding that § 703(h) of Title VII immunizes from challenge the application of a neutral seniority system even if it perpetuates the effects of past discrimination, plaintiffs redirected the focus of their challenge from the layoffs to the initial hiring. As reframed, plaintiffs' claims are identical to those asserted in 1972 in *Guardians I*.

On February 27, 1979, the District Court again granted plaintiffs' application for a preliminary injunction. The District Court premised its finding of discriminatory refusal to hire on the use of the eight eligible lists in 1973-74. Having earlier found that the eligible lists were based upon examinations which did not satisfy Title VII, the Court held that the use of the lists after 1972, when Title VII was amended to

include municipalities, constituted a continuing claim of "discriminatory refusal to hire." Since hiring continued until October 7, 1974, within 300 days of the filing by plaintiffs of charges with the EEOC in May, 1975, plaintiffs' claims were timely under Title VII. In accordance with *Teamsters, supra,* however, the Court held that only those black and Hispanic officers hired after 1972 had a claim under Title VII and relief could extend back only to 1972, the effective date of the Act.

The Court then held, however, that the Title VII "impact" standard was applicable in determining a claim of employment discrimination under Title VI of the Civil Rights Act of 1964, rather than the constitutional "intent" standard. Therefore, since plaintiffs stated a claim of discriminatory refusal to hire under Title VII, they stated an identical claim under Title VI. And since Title VI became effective in 1964, all plaintiffs appointed from the 1968-70 examinations were eligible for relief (JA 108-36).

In accordance with its opinion, the District Court entered an order recertifying the plaintiff class to include all black and Hispanic police officers who took the challenged examinations, and providing for the award of constructive seniority to each class member who failed one of the eight examinations or received a score below the median score on the examination he or she passed. The constructive seniority date is to be credited for all purposes including pension credit and benefits and incremental salary increases. The Court reserved decision on the application for back pay for both the period prior to the class member's actual appointment and the period of layoff (A 778sa).

Defendants again appealed from the preliminary injunction order to the Court of Appeals. By decision dated July 30, 1980, the Court of Appeals affirmed the District Court's holding on plaintiffs' Title VII claim and reversed that portion of the District Court's opinion and order which held plaintiffs entitled to relief under Title VI (JA 1-95).[4]

4 Judge Meskill, writing for the Court of Appeals, held that there is no implied private right of action for compensatory relief under Title

Despite the fact that the examinations and eligible lists pre-dated Title VII, the Court of Appeals rejected defendants' argument that plaintiffs' claim was not actionable under Title VII. The Court further rejected defendants' contention that the use of the eligible lists after 1972 constituted the application of a *bona fide* merit system immunized from challenge by § 703(h) of Title VII (JA 199). And the Court rejected defendants' argument that even if the use of the eligible lists after 1972 violated Title VII, only those class members refused appointment within 300 days of the filing of charges with the EEOC were entitled to relief.

REASONS FOR GRANTING THE WRIT

It is now settled that Title VII of the Civil Rights Act of 1964 may not be applied retroactively. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977). This Court has also held that the application of a *bona fide* neutral seniority system which perpetuates the effects of prior discrimination constitutes neither a violation nor a continuing violation of Title VII. *Teamsters, supra; United Air Lines* v. *Evans*, 431 U.S. 533 (1977). In the latter case, and more recently in *Delaware State College* v. *Ricks*, ____ U.S. ____, 49 U.S.L.W. 4058 (December 15, 1980), this Court painstakingly defined what constitutes a continuing violation under Title VII, giving due regard to the short statute of limitations period enacted by Congress applicable to claims under the Act. The principles guiding this Court's decisions in *Teamsters, Evans* and *Ricks* have been flagrantly disregarded by the Court of Appeals in this case in the context of the use of municipal civil service examinations.

VI. Judge Kelleher concurred with Judge Coffrin in rejecting the Title VI claim on the ground that the appropriate standard under Title VI is the constitutional "intent" standard, not the Title VII "impact" standard.

Each year, the City of New York administers hundreds of examinations for various civil service positions and the resulting eligible lists normally have a life of up to four years. However, because the City has been beset by financial difficulties for the past decade, the State Legislature, in 1976, amended New York Civil Service Law § 56 to provide for the extension of the life of an eligible list in the event of a hiring freeze. Thus, numerous civil service lists currently in use have been in existence since the early 1970s.

The decision of the Court of Appeals renders examinations subject to attack under Title VII until 300 days after the last person is appointed from the eligible list, which, under normal fiscal circumstances, may be four years after the promulgation of an eligible list or, as in this case, as much as eight years after promulgation of the list.[5]

While Title VII is both bold and sweeping in its design, and certainly its objectives are salutary, it is not without its limitations. Employers have an overriding interest in having employment claims decided expeditiously and ensuring the stability of their workforce, as was recognized by Congress in providing for the prospective application of Title VII and enacting a short limitations period applicable to claims under Title VII. After the specified period of time, an employer has the right to presume that an employment practice is valid. Here, the Court of Appeals has permitted a challenge commenced in 1976 to the use of examinations conducted in 1968 through 1970, a time when Title VII did not apply to municipalities and there were no standards then applicable to guide municipalities in their examination procedures for public positions. As a result

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5 Two other actions have been filed which allege discrimination in past examinations. In 1980, a suit was filed challenging the 1973 examination for New York City Housing Authority Police Officer, *Colon, et al.* v. *City of New York, et al.*, 80 Civ. 1580 (S.D.N.Y.), and in 1981, a suit was filed challenging the 1973 examination for Lieutenant, New York City Police Department. *The Guardians Association, etc., et al.* v. *Civil Service Commission, etc., et al.*, 81 Civ. 4861 (S.D.N.Y.).

of this decision, plaintiffs have been permitted to resurrect stale claims which they had abandoned in 1973 (*Guardians I*), and may now reap windfall benefits at grievous expense to the City and their fellow officers.

The Court of Appeals in its opinion recognized that its decision in this case would establish new standards throughout the country in employment discrimination cases. It stated in an opinion rendered a year after oral argument:

> "Unfortunately, the authorities do not speak with one voice. The only thing that has been clear, as we have considered this case, is that whichever way these issues are finally resolved, the impact on the future direction of employment discrimination litigation will be substantial. We are aware that because of the importance and complexity of these questions, today's decision will not put them to rest. Therefore, in order to facilitate the continued consideration of these issues in other forums, we have attempted to explain the factual setting and the reasons underlying our determinations in some detail."

JA 2.

In light of the continuing impact of this decision upon all civil service employers and employees, in particular white police officers who were employed during the period that the plaintiffs slept on their rights, and the substantial liability in this case, petitioners submit that this Court should take this opportunity to settle these most important issues.

1. Plaintiffs' claims of discrimination accrued for purposes of the statute of limitations upon promulgation of the rank-ordered eligible lists, prior to the effective date of Title VII. The use of the lists after 1972 constituted the application of a *bona fide* neutral merit system within the meaning of section 703(h) of the Act and did not constitute a separate or continuing violation of Title VII.

In order to determine when the statute of limitations under Title VII begins to run, the act of discrimination must be precisely identified. *Delaware State College* v. *Ricks*, ____ U.S. ____, 49 U.S.L.W. 4058 (December 15, 1980). In this case, although the Court of Appeals termed plaintiffs' claim a discriminatory refusal to hire which continued until plaintiffs' appointment in 1973-74, the acts which form the basis of plaintiffs' claim were the giving of the allegedly discriminatory examinations and the promulgation of the rank-ordered eligible lists therefrom.

New York Civil Service Law mandates, wherever practicable, the use of competitive examinations for the purpose of determining eligibility for appointment. It further requires the establishment of eligible lists from the examinations based upon raw test scores and veterans' preference. Candidates are then certified for appointment in accordance with their list ranking. Civil Service Law §§ 50, 56 and 61. Upon the promulgation of an eligible list, the order of eligibility for appointment is fixed. The New York Court of Appeals has held that any irregularities in a civil service examination coalesce and impact upon candidates for appointment upon promulgation of an eligible list. Therefore, it is upon the promulgation of the list that the claim accrues and the statute of limitations begins to run. *Martin* v. *Ronan*, 44 N.Y. 2d 374, 376 N.E. 2d 1316 (1978); *Mundy* v. *Nassau County Civil Service Commission*, 44 N.Y. 2d 352 , 376 N.E. 2d 1305 (1978).

The analysis of the Court of Appeals in reaching its conclusion makes it clear that the discriminatory acts complained of were the examinations and the plaintiffs' placement on the eligible lists, although the Court created a legal fiction to justify its result. The Court first reviewed the validity of the examinations given between 1968 and 1970 and found that, although not intentionally discriminatory (and therefore valid when administered), they failed to satisfy the standard established under the subsequently amended Title VII. The Court then found that, but for the discrimination in the examinations, plaintiffs would have scored higher on the tests, would have placed higher on the eligible lists, and thus would have been appointed at earlier dates.

Absent this retroactive application of Title VII to find the examinations discriminatory, the rank-ordered appointments in 1973-74 from the eligible lists would have been, without any doubt, entirely lawful. There is no racial discrimination inherent in the use of rank-ordered civil service lists for appointment.

Although the impact of plaintiffs' placement on the eligible lists may have continued to be felt until plaintiffs were actually appointed,[6] this Court has consistently held that the continuing impact of a past discriminatory act does not *per se* constitute a continuing violation of Title VII. See *Delaware State College*

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6 Indeed, that impact continues to be felt by plaintiffs since the date of appointment governs all seniority rights and the benefits which flow from seniority, including pension benefits and credit, promotion, vacation pick, incremental salary increases, etc.

The decision of the Court of Appeals is anomalous in that, although it allows a claim on behalf of those who passed the examinations and were ultimately hired after 1972, it appears to preclude claims by candidates who failed the pre-1972 examinations. As stated in *Teamsters, supra,* at 355:

> "If anything, the latter group is more disadvantaged. As in *Franks,* ' "it would indeed be surprising if Congress gave a remedy for the one [group] which it denied for the other." ' *Ibid.,* quoting *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 187."

v. *Ricks, supra; United Air Lines* v. *Evans,* 431 U.S. 553 (1977).

The continuing violation doctrine has no applicability to plaintiffs' claim under Title VII. In order to find a continuing violation there must first be a post-Act violation. Since the District Court here found that the examinations did not violate 42 U.S.C. §§ 1981 and 1983, no discrimination occurred prior to 1972 which could have been continued by the use of the eligible lists.

Even were the examinations discriminatory, the use of the rank-ordered eligible lists after 1972 is not a separate or continuing violation of Title VII. This Court has held that the application of a neutral seniority system does not violate Title VII even if it perpetuates pre-Act discrimination. *International Brotherhood of Teamsters* v. *United States, supra; United Air Lines* v. *Evans, supra.* The legislative history of § 703(h), extensively reviewed by this Court in its decision in *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976), indicates that the application of a *bona fide* merit system is afforded the same protection as a neutral seniority system. The focus of the discussion between the legislators in Congress was that Title VII would have prospective effect only and would not affect pre-existing employment rights. Senators Clark and Case placed in the Congressional Record an interpretative memorandum which repeated that Title VII would not place upon an employer an affirmative obligation to rectify pre-Act discrimination and went on to state:

> "However where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination . . . ."

110 Cong. Rec. 7213 (1964). Senator Clark also introduced into the Record a set of answers to questions propounded by Senator Dirksen, including the following:

> "Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?
>
> Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists."

110 Cong. Rec. 7217.

The decision of this Court in *Teamsters, supra,* recognized that the application of a seniority system which is designed to be discriminatory is not *bona fide,* and therefore not subject to the protection of § 703(h) of the Act. Similarly, the interpretative memorandum introduced by Senators Clark and Case recognize that the application of a merit system intended to discriminate would not be protected by §703(h). The section does protect by its terms, however, both neutral seniority and merit systems which merely perpetuate the effects of pre-Act discrimination. The New York State Constitution and Civil Service Law, mandating rank-ordered appointments in order to objectively obtain the best-qualified employees, is clearly a neutral merit system not designed or intended to discriminate, and therefore *bona fide* within the meaning of § 703(h) of the Act.

Even without the specific language of § 703(h), the continuing impact of the underlying discriminatory acts, here the examinations and promulgation of rank-ordered eligible lists, would not constitute a continuing violation of Title VII. In *United Air Lines* v. *Evans, supra,* at 560, this Court held that the language of § 703(h) buttressed its conclusion that no continuing violation was alleged and stated:

> "Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees who were

discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation."

Id. at 558.

Plaintiffs' claims herein are identical. Here, the application of the eligible lists has the same impact upon all candidates who received low scores on the examinations, not differentiating between those who scored poorly because the examinations may have been discriminatory or for any other reason. But that impact, as with United's date-of-hire seniority system, is not a present or continuing violation of Title VII.[7]

If the use of the eligible lists for appointments in 1973-74 constitutes a continuing refusal to hire for purposes of Title VII, then it is difficult to conceive of any situation where a refusal to hire should not be deemed likewise continuing, based upon the presumption that the prospective employer, although not again approached by the candidates, would most likely

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7 Plaintiffs' claims do not satisfy any of the traditional criteria for establishing a continuing violation.

The examinations were not a part of any integrated pattern or practice or policy of racial discrimination which continued into the limitations period (see, *e.g.*, *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239 (3d Cir.), *cert. den.*, 421 U.S. 1011 (1975); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973)); nor was there an ongoing employment relationship between plaintiffs and defendants (see *e.g.*, *Davidson* v. *Tapley*, 10 E.P.D. 6074 (S.D.N.Y. 1975); *Gautam* v. *First National City Bank*, 425 F. Supp. 579 (S.D.N.Y. 1976), *aff'd*, 573 F. 2d 1290 (2d Cir. 1977)). Finally, several courts have noted that a continuing violation should not be recognized where the plaintiffs have been guilty of laches in prosecuting their claim. See, *e.g.*, *Culpepper* v. *Reynolds Metal Co.*, 421 F. 2d 888, 892 (5th Cir. 1970); *Kennan* v. *Pan Am World Airways*, 424 F. Supp. 721, 727 (M.D. Cal. 1976). See also, Note: *Continuing Violations of Title VII: A Suggested Approach*, 63 Minn. L. Rev. 119 (1979); *E.E.O.C.* v. *Westinghouse Electric Corp.*, 592 F. 2d 484, 486-87 (8th Cir. 1979). Here, plaintiffs waited more than five years before pursuing their claims, during which period they were hired, laid off and rehired, all determined by their original ranking on the eligible lists.

continue to refuse the candidates employment. But that is not the law; such a past, time-barred refusal to hire has "no present legal consequences." *Evans, supra,* at 558.

2. Even if certain class members were discriminatorily refused hire within the limitations period, their timely claims do not resurrect the stale claims of other class members.

The Court of Appeals held that all class members appointed after 1972 were entitled to relief, declining to limit relief to only those class members who were refused hire within the 300-day limitations period. The Court held (JA 38-39):

> "These refusals were not discrete acts; they were carried out pursuant to a conceded and consistent policy.
>
> * * *
>
> Furthermore, where an illegal policy is so maintained, relief for injuries sustained even before the beginning of the limitations period is appropriate."

In reaching this conclusion, the Court erroneously relied on *Acha* v. *Beame,* 570 F. 2d 57 (2d Cir. 1978), *aff'g* 438 F. Supp. 70 (S.D.N.Y. 1977).

In *Acha,* policewomen who were laid off in 1975 challenged their layoff on the ground that but for the fact that women were excluded from taking patrolman's examinations prior to 1972, they would have been appointed earlier and accrued sufficient seniority to withstand the layoffs. After this Court issued its decisions in *Teamsters* and *Evans, supra,* the *Acha* plaintiffs amended their complaint to allege a post-1972 pattern of discrimination against female police officers, including claims of discriminatory assignments and promotional practices, a claim that the use of separate male and female lists to appoint to what became, in 1973, the unified position of police officer, delayed their appointments, and a challenge to the *bona fides* of the seniority system in that the seniority lists for males and females were merged in 1975 to determine the order of layoff. The Court of Appeals held that, if plaintiffs could

prove at trial that the use of the eligible lists after 1972 was but one facet of an integrated pattern or policy of continuing discrimination based on sex, then if any woman was discriminatorily refused hire within the limitations period, her claim would resurrect the stale claims of women refused hire prior to the limitations period.

Unlike *Acha,* plaintiffs herein have asserted no claims of discrimination other than the use of the eligible lists. If the Court of Appeals in *Acha* had deemed the use of the eligible lists to be a continuous and illegal policy in itself, it would not have been necessary to refer the question to trial. It is clear that, absent the additional allegations of discrimination by the women in all facets of their employment, the Court of Appeals in *Acha* would have limited relief to those class members who were refused hire within the 300-day limitations period.

* * *

In an action commenced eight years after the first challenged examination was administered, and in the absence of any intentional discrimination, the Court of Appeals has held the City of New York accountable for failing to have the prescience to apply Title VII standards to examinations given more than two years prior to the effective date of the Act. The fictional post-Act "discriminatory refusal to hire" claim created by the Court cannot be permitted to cloak this retroactive application of the Act, subverting the clear intent of Congress to give the rights and remedies of Title VII prospective effect only.

The claims of plaintiffs are most stale, belated claims. Plaintiffs, who commenced the instant action five years after the promulgation of the civil service eligible lists, have no claim on the sympathy of the courts. They sat on whatever rights they may once have had. It was only because of the city's fiscal crisis and the impending layoffs that the plaintiffs commenced a new action challenging the hiring pursuant to the old examinations. According them the relief they seek will work an injustice upon the City of New York, its taxpayers and those

other police officers from whom plaintiffs would take earned seniority. The statute of limitations provisions in Title VII were in part intended to compel a complainant to pursue his claim promptly to enable the governmental entity to correct the practice without undue disruption to its operations. The decision in the instant case, if not reversed, permits tardy plaintiffs to completely frustrate that purpose.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

August 31, 1981

Respectfully submitted,

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Supplemental Brief

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No. 81-432

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Petitioners,

-v.-

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ and FELIX E. SANTOS,

Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, pursuant to Rule 22.6 of the Rules of the Supreme Court, submit this supplement to the petition for a writ of

certiorari filed on August 31, 1981 in order to call to the attention of this Court the recent decision of the United States Court of Appeals for the Third Circuit in Bronze Shields, Inc., et al. v. The New Jersey Department of Civil Service, et al., Nos. 80-2003 and 81-1133 (3d Cir., December 1, 1981). The decision is in direct conflict with that of the Court of Appeals for the Second Circuit herein with respect to the issue of when a claim that a civil service examination is discriminatory accrues for the purpose of the statute of limitations and whether the subsequent use of the eligible list from the examination constitutes a continuing violation of Title VII of the Civil Rights Act of 1964, as amended.

In Bronze Shields, Inc., supra, plaintiffs alleged, inter alia, that an entry-level police officer examination given in

January, 1975, was discriminatory on the basis of race in violation of Title VII. The eligible list for appointment was promulgated in May, 1975, and plaintiffs filed charges with the Equal Employment Opportunity Commission on July 9, 1976, more than 180 days after the promulgation of the eligible list. The District Court held that the allegedly discriminatory employment practice occurred upon the promulgation of the eligible list and the subsequent use of the eligible list for rank-ordered appointments did not constitute a continuing violation of Title VII. The Court, therefore, dismissed the claim as untimely.

In so holding, the Court specifically declined to follow the reasoning of the Court of Appeals for the Second Circuit in the instant case. Rather, the Court found that the decisions of this Court in Delaware

State College v. Ricks, 449 U.S. 250 (1980), and United Air Lines v. Evans, 431 U.S. 553 (1977), were controlling, and required a finding that the continued use of the eligible list for rank-ordered appointments did not satisfy the criteria for a continuing violation.

The fact that the plaintiffs in Bronze Shields, Inc. each failed the challenged examination as opposed to the plaintiffs in this case who passed the examinations but claimed that had the examinations not been discriminatory they would have scored higher and therefore been appointed sooner is insignificant. Both sets of plaintiffs feel the effects of the discriminatory examinations during the life of the list -- those who fail are unable to reapply for positions, and those who pass have their appointments delayed. The relevant fact, as recognized

by the Court in Bronze Shields, Inc., is that all rights become fixed and certain upon promulgation of the eligible list.

CONCLUSION

For the reasons set forth in the petition, and in view of the clear conflict between the Circuits, a writ of certiorari should be granted.

December 31, 1981

Respectfully submitted,

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Opposition

No. 81-432

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Petitioners,

—against—

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ AND FELIX E. SANTOS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. In a civil rights class action alleging unlawful discrimination in employment in which plaintiffs proved that non-job-related entry-level employment examinations administered by a municipality in 1968-70 had a discriminatory effect on minority applicants, are hiring decisions made in 1973-74 based on the results of the discriminatory examination immune from liability under Title VII?

2. In a civil rights class action in which plaintiffs proved that defendants violated Title VII by a continuing policy of hiring based on discriminatory examinations, if a class representative files a timely charge with the Equal Employment Opportunity Commission is the requirement of 42 U.S.C. § 2000e-5 satisfied for all members of a properly certified class?

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-432

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

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THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ AND FELIX E. SANTOS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents submit this brief in opposition to a petition for writ of certiorari filed August 31, 1981. The petition

seeks review of a unanimous decision by a panel of the United States Court of Appeals for the Second Circuit dated July 25, 1980, which held that the use after March 24, 1972 of hiring lists promulgated pursuant to discriminatory examinations administered between 1968 and 1970 constituted a continuing discriminatory refusal to hire in violation of Title VII of the Civil Rights Act of 1964, and that a timely charge filed by a class representative with the Equal Employment Opportunity Commission ("EEOC") satisfied the requirement of 42 U.S.C. § 2000e-5(e) for the entire class.

Statement of the Case

The following abbreviated statement of the case is limited to the Title VII claims raised by petitioners in this application for review.*

Respondents, plaintiffs below, brought this action on April 30, 1976 pursuant to, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to challenge the petitioners' layoffs of approximately 2,800 police officers in June 1975 based on a policy of reverse seniority. Plaintiffs contended that the entry-level examinations used by the Police Department were discriminatory, and that but for their discriminatory impact on minorities, minority applicants would have been hired earlier and thus

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* Respondents here are petitioners in *The Guardians Association, etc., et al. v. Civil Service Commission of The City of New York, et al.*, No. 81-431 (referred to hereinafter as "No. 431"), which was filed on August 31, 1981 and seeks review of the decision of the United States Court of Appeals for the Second Circuit regarding the standard for liability under 42 U.S.C. § 2000d and 42 U.S.C. § 1981. A more complete statement of the case appears in respondents' petition for review. *See* No. 431 pp. 2-8. To avoid confusion, the parties will be referred to herein as "plaintiffs" and "defendants". References to (A——) are to pages in the Joint Appendix.

would have accrued sufficient seniority to withstand the layoffs (A4). The district court first certified the proposed class, comprised of "all black and Hispanic New York City policemen currently on layoff who would not have been furloughed but for defendants' allegedly discriminatory employment practices." The court then concluded that the examinations were discriminatory under Title VII standards and that the layoffs perpetuated the effects of the prior discrimination in violation of Title VII (A4-5). Accordingly, the district court granted a preliminary injunction restraining defendants from firing or recalling any officers until the seniority lists were adjusted "to accord plaintiffs the seniority they would have had but for the defendants' discriminatory practices."

On appeal, the Second Circuit vacated the injunction and remanded the case to the district court for reconsideration in light of this Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), which ruled that a bona fide seniority system which merely perpetuated the effects of pre-Title VII discrimination beyond the effective date of the Act was immunized by § 703(h) of the statute, 42 U.S.C. § 2000e-2(h) (A37-38).

On remand, the district court concluded that *Teamsters* did not defeat the Title VII claims of those class members hired after March 24, 1972. The court concluded that the use of the eligibility lists until October 7, 1974 was a discriminatory refusal to hire which constituted a continuing violation of Title VII. Since EEOC charges were timely filed within the statutory period running from the date of the last illegal appointment on October 7, 1974, all plaintiffs were deemed to have filed timely claims under § 706(e) of Title VII, 42 U.S.C. § 2000e-5(e).

The Second Circuit affirmed the district court's determination that the examinations were discriminatory and not

job-related (A10-30), and upheld the district court's decision that the post-Act use of the examination results for hiring purposes constituted a continuing discriminatory refusal to hire. The Court of Appeals rejected defendants' argument that their hiring practice was a "bona fide merit system" exempt from Title VII requirements under 703(h), 42 U.S.C. § 2000e-2(h). The Court of Appeals noted that it was unlikely that the term was meant to apply to an entry-level practice but held that, even if it were,

> "[o]nce it has been determined that an examination has a disproportionate impact on minority groups and that it is not job-related, one cannot logically characterize a system of hiring solely on the basis of the results of the test as a 'merit' system . . ." (A43).

Finally, the Court of Appeals upheld the granting of relief to all class members who were refused employment after March 24, 1972, the effective date of the Act as to municipal employers. The Court concluded that since defendants' refusal to hire was pursuant to a continuously maintained policy,

> "[a]ll plaintiffs injured by the department's post-Act adherence to that policy are therefore entitled to relief." (A38).

Petitions for rehearing, with suggestions for rehearing *en banc*, were filed by both parties. On June 1, 1981, the Second Circuit denied both petitions (A97-98).

REASONS FOR DENYING THE WRIT

Defendants have pointed to no "special and important" reasons for reviewing the finding of liability under Title VII in this case. While plaintiffs freely admit the importance

of vindicating the federal rights of employees subjected to discrimination, the issues pressed in this petition, however important in the abstract, were resolved below in a manner consistent with the language of Title VII, the purposes and policies underlying the statute, and prior judicial interpretation in this Court and the various courts of appeals.

I.

The Decision of the Court of Appeals That Post-Act Discriminatory Refusals to Hire Pursuant to Pre-Act Examinations Violate Title VII Is Manifestly Correct and Does Not Conflict With the Law of Either This Court or the Various Courts of Appeals.

For purposes of this petition, it is undisputed that the examinations administered by defendants between 1968 and 1970 were not job-related and had a discriminatory impact on minorities. Defendants continued to base hiring decisions on those examinations until October 1974—more than two years after Title VII became applicable to municipalities. On these facts, the conclusion of the Second Circuit—that the post-Act use of eligibility lists generated by a non-job-related examination which disproportionately affected minorities constitutes a discriminatory refusal to hire—is an eminently reasonable application of the statute and is consistent with the determinations of this Court and of other courts of appeals.

Defendants seek to avoid this reasonable result by arguing: (1) that when hiring is carried out pursuant to the results of an examination, it is only the examination or the eligibility lists promulgated therefrom, and not the hiring decisions based upon that examination or list, that can be challenged under Title VII; and (2) that even if

the use of examination results constitutes a continuing refusal to hire, this refusal is insulated from challenge by § 703(h) of Title VII, which protects "bona fide merit systems." As the Second Circuit recognized, "logic and precedent preclude acceptance of defendants' assessment of the legal significance of their actions." (A33-34).

A. Hiring Decisions Based on Eligibility Lists Promulgated Pursuant to Non-Job-Related Examinations Which Have a Discriminatory Impact on Minorities Violate Title VII

Defendants argue that their discriminatory hiring practices did not continue beyond the date when the eligibility lists were promulgated and that their refusals to hire based on the results of discriminatory examinations are therefore mere effects of the pre-Act discrimination. Although the expediency of this argument is clear, it has support in neither law nor logic. As the Second Circuit recognized, the results of the tests "were in effect being 'used to discriminate,' in direct contravention of § 703(h) of Title VII, each time a member of the plaintiff class was denied a chance to fill a vacancy." (A34) (footnote omitted).

Defendants' contention that the promulgation of eligibility lists is the only operative event for purposes of Title VII conflicts with the express language of the statute. Section 703(h) of Title VII provides in relevant part:

> " . . . nor shall it be an unlawful employment practice for an employer to give and to *act upon the results of* any professionally developed ability test provided that such test, its administration or *action upon the results* is not designed, intended or *used to discriminate* because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h) (emphasis added).

The statute's focus on the *use* of examinations is thus clear.

Moreover, it is well-settled in the Second Circuit and in other jurisdictions that an employer violates Title VII so long as it continues to deny jobs on the basis of a discriminatory hiring policy. *See, e.g., Roberts* v. *North American Rockwell Corp.*, 650 F.2d 823, 827-28 (6th Cir. 1981); *Association Against Discrimination in Employment* v. *City of Bridgeport*, 647 F.2d 256, 272-73 (2d Cir. 1981); *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 987 (D.C. Cir. 1973); *Ridgeway* v. *International Brotherhood of Electrical Workers*, 466 F. Supp. 595, 599 (N.D. Ill. 1979) (continuing failure to permit admission to union); *cf. Higgins* v. *State of Oklahoma*, 642 F.2d 1199, 1200 n.2 (10th Cir. 1981) (continuing discrimination in promotions); *Jenkins* v. *Home Insurance Co.*, 635 F.2d 310, 312 (4th Cir. 1980) (compensation); *Patterson* v. *American Tobacco Co.*, 634 F.2d 744, 751 (4th Cir. 1980) (promotions); *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 743-44 (8th Cir. 1980) (compensation); *Reed* v. *Lockheed Aircraft Corp.*, 613 F.2d 757, 760 (9th Cir. 1980) (promotions). Defendants do not even acknowledge the existence of this substantial body of consistent case law.

Defendants' reliance on this Court's decisions in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980) and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977) is plainly misplaced.* *Evans* and *Ricks* hold that a Title

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* Defendants also rely on New York cases which purportedly hold that an employment discrimination claim accrues upon promulgation of the examination. Petition at 11. As the Second Circuit noted, these cases were concerned solely with interpreting the four-month statute of limitations governing proceedings against administrative bodies or officers under Article 78 of New York's Civil Practice Law and Rules and are not relevant to suit in federal court based on Title VII (A34 n.31).

VII claim may not be predicated solely on the continuing impact within the limitations period of a violation which pre-dates the limitations period. The decisions of the district court and of the Court of Appeals in this case, in a manner entirely consistent with *Ricks* and *Evans*, were premised not on the continued *impact* of pre-Act discrimination, but on actual post-Act refusals to hire. Both courts recognized that defendants violated Title VII when they made hiring decisions after March 24, 1972 on the basis of criteria that were not job-related and had a discriminatory impact on minorities.

Numerous other courts have recognized this distinction between continuing violations and continuing impact from past violations and have concluded that *Evans* does not preclude liability for violations which continue into the Title VII limitations period. *See, e.g., Jenkins* v. *Home Insurance Company*, 635 F.2d at 312; *Patterson* v. *American Tobacco Co.*, 634 F.2d at 751; *Roberts* v. *North American Rockwell Corp.*, 650 F.2d at 827-28; *Reed* v. *Lockheed Aircraft Corp.*, 613 F.2d at 760; *Ridgeway* v. *International Brotherhood of Electrical Workers*, 466 F. Supp. at 599.

Defendants in effect ask this Court to rule that despite the express prohibition against the use of tests to discriminate, Title VII validates all post-Act hiring practices, no matter how discriminatory, so long as those practices were commenced prior to the effective date of the Act. There is no support in the case law for such an interpretation, which is contrary to both the spirit and the language of the Act.

B. A Continuing Policy of Hiring Pursuant to Discriminatory Examinations Is Not a Bona Fide Merit System Within the Meaning of § 703(h) of Title VII

Defendants' attempt to invoke the aegis of § 703(h) for their discriminatory refusals to hire squarely conflicts with the language and remedial purposes of Title VII. In effect, defendants argue that even if their post-Act hiring practices would otherwise have violated Title VII, the mere fact that hiring was based upon civil service examinations entitles such practices to the protection granted by § 703(h) to the narrow category of "bona fide merit systems."

The Second Circuit properly rejected this argument, which was presented by defendants for the first time in the Court of Appeals. First, the Court expressed doubt that the "merit system" exception applies to hiring practices (A39-41). Defendants have cited no authority in support of their contention that it does.

Second, even assuming that hiring practices might under appropriate circumstances be considered a "merit system," the Court of Appeals concluded that "a hiring system that ranks applicants according to their performance on discriminatory examinations cannot claim the status of a 'bona fide merit system' within the meaning of the statute." (A41). As the Court of Appeals recognized,

> "Once it has been determined that an examination has a disproportionate impact on minority groups and that it is not job-related, one cannot logically characterize a system of hiring solely on the basis of the results of the test as a 'merit' system—for whatever the test does measure it does not have merit: it does not measure fitness for the job in question, which is surely the only logical meaning of the term 'merit' in the hiring context." (A43).

In response to defendants' contention that the tests were intended to measure merit and to "objectively obtain the best qualified employees . . .", Petition at 14, the Court pointed out that the second clause of § 703(h), which deals explicitly with testing procedures, permits employers "to give and to act upon the results of any professionally developed ability test *provided that such test, its administration or action upon the results is not* designed, intended or *used to discriminate* . . .". 42 U.S.C. § 2000e-2(h) (emphasis added). Thus, a test which purports to measure merit cannot be "used to discriminate." The proviso regarding "ability tests" would have little meaning if employers could use non-job-related tests to discriminate by the simple expedient of invoking the "bona fide merit system" language of § 703(h).*

Finally, despite defendants' intimations to the contrary, the decision below is entirely consistent with *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), which holds that § 703(h) precludes the imposition of Title VII liability based on the mere perpetuation of discriminatory effects by a neutral seniority system. As the Court of Appeals pointed out, the seniority system under scrutiny in *Teamsters* was race-neutral. In this case, the post-Act hiring system under scrutiny was found to be discriminatory:

> "Unlike the seniority system in *Teamsters*, the merit system in the instant case does not measure what it purports to measure. The failing of the department's hiring system is therefore not that it

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* Indeed, under the Second Circuit's interpretation of § 703(h), that section furthers the mandate of the New York Civil Service Law, upon which petitioners rely, by insuring that hiring tests truly measure ability; surely the objective of obtaining "the best-qualified employees" is hindered rather than furthered by hiring based on examinations which are race-related but not job-related.

> perpetuates *the effects* of past discrimination, but rather that it perpetuates discrimination. It is one thing to utilize a system that locks in the effects of past discriminatory hiring decisions; it is a very different thing to lock in a discriminatory method of making hiring decisions." (A42-43) (emphasis in original).

See also Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d at 272-73. Surely, neither Congress nor the Court in *Teamsters* intended that the results of discriminatory pre-Act examinations could be used indefinitely as the basis for hiring decisions.

II.

The Court of Appeals Properly Concluded That if an Employer Has Engaged in a Continuing Violation of Title VII, a Charge Timely Filed With the Equal Employment Opportunity Commission by a Class Representative Satisfies the Requirement of 42 U.S.C. § 2000e-5(e) for All Members of a Properly Certified Class.

The Court of Appeals held that all members of the class were entitled to relief for injuries suffered from defendants' continuing violations. Defendants assail this aspect of the holding on the grounds that: 1) the Court misinterpreted a prior decision of the same circuit, *Acha* v. *Beame*, 570 F.2d 57 (2d Cir. 1978), 2) the Court improperly concluded that defendants' hiring practice constituted a continuing policy in violation of the Act, and 3) plaintiffs sat on their rights to the prejudice of the defendants.

A purported misinterpretation by one panel of a circuit of a prior decision by the same circuit does not warrant review on writ of certiorari. Such misinterpretations are more appropriately corrected by the Court of Appeals

itself, on rehearing *en banc*. Surely the Second Circuit is in the best position to know what it meant in *Acha*, and its denial of defendants' petition for rehearing with suggestion for rehearing *en banc** suggests that it concurred in the interpretation of the panel below. The Court of Appeals adhered to that interpretation when it was given another opportunity in *Association Against Discrimination in Employment* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981). Moreover, even a patent conflict between two decisions of the same circuit is not in itself sufficient ground for review by this Court, *e.g.*, *Davis* v. *United States*, 417 U.S. 333 (1974); *cf. Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of the Court of Appeals to reconcile its internal difficulties.")

The Court of Appeals upheld the district court's timeliness decision on the ground that the discriminatory refusals to hire

> "were not discrete acts; they were carried out pursuant to a conceded and consistent policy. All plaintiffs injured by the department's post-Act adherence to that policy are therefore entitled to relief." (A38).

There is ample support for the Court of Appeals' position that the timeliness of a filing is determined with reference to the period during which a discriminatory policy remained operative. *Macklin* v. *Spector Freight Systems Inc.*, 478 F.2d 979, 987 (D.C. Cir. 1973); *Roberts* v. *North American Rockwell Corp.*, 650 F.2d 823, 827 (6th Cir. 1981); *Ridgeway* v. *International Brotherhood of Electrical Workers*, 466 F. Supp. 595, 599 (N.D. Ill. 1979). Defendants

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* Defendants' petition for rehearing in the Court of Appeals was denied on June 1, 1981 (A97-98).

have not cited any contrary authority. In effect, all defendants have done is to challenge the district court's finding, upheld by the Court of Appeals, that a series of hiring decisions all made on the basis of the same test results constitutes a continuous practice or policy rather than a series of discrete acts. Purported errors in fact finding, particularly findings concurred in by an appellate court, are not an appropriate subject for review "in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *aff'd on rehearing*, 339 U.S. 605 (1950). No such showing has been made by the defendants here.

Finally, by raising the specter of stale claims, defendants hope to receive the benefit of laches without actually invoking the doctrine. Defendants no doubt have avoided explicitly invoking laches because, as the Second Circuit held below, they have failed to allege or prove any prejudice in the defense of their case. As the Court of Appeals noted, the defendants had "been on official notice of the suspect nature of their hiring procedures at least since 1973." (A38 n.36). Defendants thus again seek this Court's review of nothing more than factual matters determined by the courts below.

CONCLUSION

Defendants have not identified any conflicts between the law as set forth by this Court or the courts of appeals and the decisions of the panel below that: 1) defendants engaged in a post-Act violation by hiring on the basis of discriminatory examinations, and 2) defendants hired pursuant to a continuing policy for which all affected class members are entitled to relief. This Court's decision in *United Air Lines, Inc.* v. *Evans* and *International Brotherhood of Team-*

sters v. *United States* are inapplicable to the continuing violations found in this case. Defendants' only other arguments address purported inconsistencies in the decisions of the Second Circuit and challenge the factual findings of the courts below. Neither argument merits the consideration of this Court by writ of certiorari.

For the foregoing reasons, defendants' petition for a writ of certiorari should be denied.

Dated: October 1, 1981

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Supplemental Brief

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No. 81-432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALFONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Petitioners,

—against—

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ AND FELIX E. SANTOS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases

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Delaware State College v. Ricks, 449 U.S. 250 (1980)..... 4, 5

Statute

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq..... 2, 3

IN THE

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October Term, 1981

No. 81-432

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents The Guardians Association,* et al. respectfully submit this supplemental brief pursuant to Rule 22.6 of the Rules of the Supreme Court in response to defendants' Supplement to their Petition for a Writ of Certiorari.

In their Supplement, defendants contend that the recent decision of the Third Circuit in Bronze Shields, Inc. v. The New Jersey Dept. of Civil Service, slip op. Nos. 80-2003 and 81-1133, 27 FEP Cases 749 (3rd Cir., December 1, 1981) conflicts with the decision of the Second Circuit below with respect to the issue of whether defendants' hiring practices constitute a continuing violation of Title VII

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* Respondents herein are petitioners in the Guardians Association, etc., et al. v. Civil Service Commission of the City of New York, et al., No. 81-431. To avoid confusion, the parties will be referred to herein as "plaintiffs" and "defendants."

of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and that review of this issue on writ of certiorari is therefore appropriate. Contrary to defendants' contentions, however, the Bronze Shields decision is fully consistent with the decision of the Second Circuit below. Accordingly, for the reasons set forth in plaintiffs' Brief in Opposition, defendants' Petition should be denied.

In Bronze Shields, plaintiffs brought suit individually and on behalf of a class alleging, inter alia, that a written examination administered by the State of New Jersey had a disproportionate impact on minorities. Slip op. at 5-6. Plaintiffs failed the examination and claimed that they had discriminatorily been excluded from employment.

Plaintiffs filed charges with the

Equal Employment Opportunity Commission ("EEOC") more than 180 days after the promulgation of the list of eligible candidates, which formally confirmed their failure of the examination.* At the time of their filing, the eligibility list had never been used as the basis for any hiring decisions.** Plaintiffs contended that their filings were timely because the roster constituted an unlawful employment practice which continued to violate Title VII for as long as it was in effect, a period which included the date of their filings. The District Court rejected plaintiffs' argument and held that the last allegedly discriminatory employment practice occurred when

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* Plaintiffs had received actual notice several months earlier.

** The list subsequently was used once.

defendants failed to include plaintiffs on the eligibility roster.* The Third Circuit affirmed, relying on this Court's decision in Delaware State College v. Ricks, 449 U.S. 250 (1980).

The Third Circuit's decision is fully consistent with the decision of the Second Circuit below. After plaintiffs failed the examination and were not included on the eligible list, defendants in Bronze Shields took no further action with respect to plaintiffs and indeed had no further action to take. As the Court noted, "[t]he record does not show that

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* The issue of whether the alleged discriminatory act constituted a continuing violation arose in the context of a motion to certify a class. Class certification was denied because of the named plaintiffs' failure to file EEOC charges within the required 180 days. The District Court subsequently dismissed the named plaintiffs' Title VII cause of action on the same ground.

defendants acted in any way which aggrieved plaintiffs within the 180 days before plaintiffs filed their EEOC charge. The only act of which plaintiffs complain was the promulgation of the eligibility roster on May 3, 1975." Slip op. at 18. The exclusion of plaintiffs from the eligibility list was comparable in its finality to a discharge, or to the denial of tenure in Ricks. In Ricks, plaintiff knew that the decision had been made to terminate his employment; in Bronze Shields, plaintiffs knew that employment was absolutely refused.

As the Third Circuit recognized, however, the facts in Bronze Shields were significantly different from those of the Guardians case. Id. at 15 n. 21, 18 n. 23. First, plaintiffs in Guardians all passed the written examinations, were

placed on the eligibility roster and were ultimately offered employment. The Second Circuit noted that it "express[ed] no view on issues of concern only to those applicants who failed the challenged examinations and thus were never placed on an eligibility list." (A32-33 n. 30)

For the plaintiffs in Guardians, placement on the list was but the initial step in the hiring process. The ultimate effect of the discriminatory ranking on plaintiffs' hiring and seniority could not have been known at the time the list was promulgated. Each of the other candidates who ranked higher than them on the list was subject to elimination during subsequent medical, physical and other screening procedures, and each might refuse the position when offered; moreover, the defendants might offer employ-

ment to all candidates as of the same date, obviating the effect of the rank ordering. The promulgation of the list consequently lacked the finality that promulgation of the roster had on those who had failed the examination in Bronze Shields, or that the denial of tenure had on the plaintiff in Ricks.

Second, although plaintiffs in Bronze Shields challenged defendants' use of the roster, the Third Circuit noted, in rejecting plaintiffs' argument, that the roster was in fact never used prior to plaintiffs' filing of their EEOC charges. As the Third Circuit recognized, this circumstance differs markedly from the facts before the Second Circuit in Guardians, where the list was used continually as the basis for hiring decisions. Slip op. at 15 n. 21.

In sum, the facts and issues before the Second Circuit in Guardians were materially different from those in Bronze Shields. The issues addressed by the Second Circuit were resolved consistently with the language, policies and purposes of Title VII and with the decisions of this Court and of the various courts of appeals. Defendants' petition for a writ of certiorari should therefore be denied.

Dated: January 5, 1981

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